

GAHC040004362023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

CRL. APPL. No. 13 (AP)/2023

Shri. Tamar @ Chikmar Malling,
S/o Lt. Tachik Malling,
R/o Pillong Malling Village,
P.O & P.S.-Dumporijo,
District-Upper Subansiri, A.P.

..... **Appellant**

VERSUS

1. The State of Arunachal Pradesh,
represented through the Id. Public Prosecutor.

2. Mr.s. Yadik Nungnu
D/o Shri. Talen Nungnu
R/o Nungnu village, P.O & P.S. Taliha,
Upper Subansiri District,
Arunachal Pradesh.

..... **Respondents**

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Mr. R. Sonar, Advocate

Advocate for the Respondent : Mr. J. Tsering, learned Addl. P.P.

Date of Hearing : **19.07.2023**

Date of Judgment : **29.11.2023**

JUDGMENT & ORDER (CAV)

1. Heard Mr. R. Sonar, learned counsel appearing for the petitioner. Also heard Mr. J. Tsering, the learned Public Prosecutor representing the State of Arunachal Pradesh/respondent No. 1. Mr. K. Saxena, the learned counsel for respondent no. 2.

2. Shri. Tamar Alias Chikmar Mallig (hereinafter the appellant) has filed this revision Petition Revision petition under Section 397, 398 R/w 401 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short), challenging the legality and the propriety of the judgment and order dated 05.09.2022 and the order of sentence dated 07.09.2022, passed by the learned Additional Session Judge, Basar, Leparada District, in connection with BSR/Session Case No. 01/2020, convicting the petitioner under Section 376(1) of the Indian Penal Code (IPC for short) and sentencing him to undergo rigorous imprisonment for 07 (seven) years and a fine Rs. 2000/- (Rupees Two Thousand Only) with default stipulation. This revision petition was later registered as an appeal vide provisions of Section 401(5) of the Cr.P.C.

3. Brief facts leading to this appeal is that on 27.10.2017 at around 10.00 hours, at Urban Complex, Lenyi Village under Dumporijo P.S., the appellant

committed rape on the 16 year old victim 'X', who was staying in the house of Smt. Yamak Nguki. Taking advantage of the absence of the family members in the house, the appellant committed rape on the victim 'X'. The victim's father 'Y' lodged and FIR, which was registered as DMJ PS C/No. 15/17 U/Ss-376/506 IPC R/w Section 4 of POCSO Act, 2012 (POCSO Act for short).

4. The Investigating Officer (I/O in short) embarked upon the investigation and on completion of investigation submitted charge-sheet against the appellant. At the commencement of trial, a formal charge under Section 376(1) IPC was framed and read over and explained to him to which the appellant abjured his guilt and claimed innocence. To connect the appellant to the crime, the prosecution adduced the evidence of 6 (six) witnesses including the Medical Officer (M.O in short) and the I/O.

5. The circumstances against the appellant projected through the evidence have been read over and explained to him under Section 313 Cr.P.C and his responses were recorded.

6. Mr. R. Sonar, learned counsel for the appellant laid stress in his argument that the FIR was lodged by the victim's father after 20 days. There is no medical evidence against the appellant as no ingredients under the POCSO Act could be found. The POCSO Act was dropped and the appellant was convicted under the

Indian Penal Code. It is contended the evidence of DW-1 clearly reveals that despite being called out repeatedly, the victim could not come out and this causes a dent in the evidence against the appellant. It is not possible to commit rape on a victim who resides in the building occupied by 45 to 50 odd family members. The place of occurrence was a building and was occupied by 40 to 50 family members and the offence was allegedly committed during the day time. It is submitted that the allegation of sexual assault has been negated by the victim, who herself stated under Section 164 Cr.P.C, she herself removed her garment.

Although, PW-3 stated that nobody resides near the place of occurrence, yet the sketch-map Exhibit-P/13/PW-5 clearly reveals that there are around 40 to 45 families around the place of occurrence.

7. It is submitted by the learned counsel on behalf of the petitioner that the victim who was inside the bathroom could have easily cried for help. The I/O has reflected through his deposition that only on the statement of the victim, the charge-sheet was filed. There was no FSL report, no medical report to prove the case against the appellant. It is submitted that the learned trial Court erroneously relied on the statement of the appellant under Section 313 Cr.P.C, and convicted him. It is admitted by the appellant that a Kebang was held but the Kebang was not held due to the incident, but it was held as the victim was

assaulted by the appellant's wife. The Trial court ignored the evidence adduced by the defence witnesses.

8. The learned counsel for the petitioner has relied on the following decisions:-

- (i) *Thulia Kali Vs. The State of Tamil Nadu (1972) 3 SCC 393,*
- (ii) *Md. Ahmed Ali and Others Vs. State of Assam (1998) 1 GLR 455,*
- (iii) *State of Andhra Pradesh Vs. M. Madhusudhan Rao (2008) 15 SCC 582,*
- (iv) *Dehal Singh Vs. State of Himachal Pradesh (2010) 9 SCC 85,*
- (v) *Krishan Kumar Malik Vs. State of Haryana (2011) 7 SCC 130,*
- (vi) *Rajesh Patel Vs. State of Jharkhand (2013) 3 SCC 791,*
- (vii) *R. Shaji Vs. State of Kerala (2013) 14 SCC 266.*

9. The learned Public Prosecutor Mr. J. Tsering laid stress in his argument that the medical examination on the victim was conducted after one month, and so no trace of sexual assault could be detected. Semen in body is not required to prove rape. The statement of the victim under Section 164 Cr.P.C, clearly reveals that the petitioner is complicit. The statement of the accused under Section 313 Cr.P.C to the question No. 2 clearly reveals that he did not call the victim on the alleged day of the incident but the victim herself came to his rental room in the aforesaid urban building. The accused himself has admitted the presence of the victim in his room on the day of the incident. The accused has also admitted in his statement under Section 313 Cr.P.C to the Question No.

5 that no Kebang was held to resolve the instant matter locally but the Kebang was held to claim compensation from him @ ₹ five lacs for inducing the victim into a love relationship with him which marred the image of the victim, as she was found sitting with him in his rental room. He refused to pay the compensation, as he did not commit any offence and then the victim's side lodged the FIR against him.

10. It is submitted by the learned Public Prosecutor (P.P. for short) that the petitioner has admitted that the victim was induced into a love relationship with him. It is submitted by the learned P.P. that independent witnesses are not required to prove an offence of rape. The statement of the appellant under Section 313 Cr.P.C and the victim's evidence proves beyond a reasonable doubt that the door of the room in which the accused and the victim were present was bolted.

11. The learned P.P. has not agreed with the argument of the learned counsel for the appellant because the victim has mentioned in her statement under section 164 Cr.P.C that she undressed because she was threatened. This minor contradiction has to be ignored, but at the same time the presence of the victim admitted by the accused under Section 313 Cr.P.C cannot be ignored.

The learned Addl. P.P. has supported the decision of the learned trial

Court. It has to be mentioned that this Revision Petition was converted to an appeal vide order of this Court dated 28.03.2023.

12. Now, the question that falls for consideration is that whether the learned trial court erred by convicting the appellant under Section 376(1) of the IPC. To decide this case in its proper perspective, the evidence is reappraised.

13. The victim 'X' deposed as PW-3 that the appellant was her cousin Smt. Yamak Nguki's neighbour and they used to reside in the Urban Complex at Dumporijo (or Daporijo). The appellant was not known to her before the incident. Some years ago, while she was alone in the rental house of her cousin, Yamak Nguki (PW-2), the appellant being a neighbour, came to the rented house where she was residing with her cousin. At that time her cousins Yamak and Yapik were not at home and she was alone at home. Then, addressing her as Behan (sister) the appellant called her to his rented house. She was under the impression that she might really be related to the appellant and she went to his house. When she went into his room, the appellant forcefully removed her clothes, including her underwear, and gagged her and committed rape on her. She could not shout or resist, as the appellant overpowered her and gagged her. The door was bolted from top and she could not reach the latch as she was a minor. There were people present in the nearby residences. The appellant's wife was also not present at home. After some time, her other cousin Yapik Uli (PW-

1) came to the rented house of the appellant looking for her and started knocking at the door, and she (PW-1) asked the appellant whether, she, (PW-3) was inside his room, but the appellant did not reply for some time. After repeated queries and requests for opening the door, the appellant opened the door. On entering into the room, her cousin could identify her slippers, and then, she confronted the appellant and rebuked him for lying. Her cousin (PW-1) also opened the bathroom door, where she was hidden by the appellant, and thereafter, she was taken back to their residence. Later, on the same day, the appellant's wife learnt about the incident, and the appellant's wife mercilessly assaulted her, which impelled her to lodge an FIR against the appellant. She went to the Court at Dumporijo and her statement was recorded under Section 164 Cr.P.C. She proved her statement under Section 164 Cr.P.C. as P. Ext.1. In her cross examination, the victim admitted that she mentioned in her evidence that the appellant took her to his room and forcefully removed her garments, but in her statement under Section 164 Cr.P.C, she state that the appellant coerced her to remove her dress, and as she was terrified, she removed her pants and panties too. She has also admitted that the learned Judicial Magistrate 1st Class at Daporijo has wrongly recorded her statement.

14. Further, the PW-1 has admitted in her cross--examination that the Judicial

Magistrate 1st Class has wrongly recorded her statement that she started shouting for help but the truth is that she could not shout for help as the appellant had gagged her by her mouth. The statement falsely recorded by the Judicial Magistrate is that she stated before the Magistrate that she banged on the door of the bathroom and was crying out loud and upon hearing her cries, her sister (PW-1) opened the bathroom door.

15. A close scrutiny of the evidence of PW-3 does not appear to be worthy of credence. She has mentioned under Section 164 Cr.P.C that she was terrified of the appellant and she removed her dress and was totally naked, whereas, she has denied in her cross- examination that she was totally naked at the time of the incident. In her statement under Section 164 Cr.P.C, she stated that her elder sister was knocking at the door and calling out "Malling Sir" and then the appellant asked her to get dressed quickly and go inside the bathroom, but she did not go and the appellant pushed her inside and locked the bathroom from outside and then, when the appellant opened the door to her sister, (PW-1) came in and she (PW-3) started banging on the bathroom door and cried out loud.

On the contrary, in her evidence-in-chief, the PW-3 stated that her sister came into the room and confronted the appellant after noticing her slippers and

then, her sister took her out of the bathroom. She has not at all mentioned that she kept on banging at the bathroom door.

16. This witness also went to the extent of stating that the JMFC, falsely recorded her statement under Section 164 Cr.P.C. It has been admitted by this witness (PW-3) that she lodged the FIR, as she was mercilessly assaulted by the appellant's wife after the incident. PW-1, who was the first person to rescue the victim, does not at all support the evidence of the victim, PW-3. Smt. Yapik Uli, deposed as PW-1 that the appellant is her younger sister. Sri Yamak Nguki's neighbor and they reside at Urban Complex in Dumporijo. About three years ago, she visited her younger sister Yamak Nguki, who was residing at Urban Complex and she stayed with her sister for a few days too. On the day of the incident, her sister left for work at a school in Daporijo and she was washing vegetables with her victim sister. After some time her sister, 'X' went back to the house, while she was still at the water tap. When she finally returned, home, she could not find her sister 'X'. She started looking for her sister. She repeatedly called her sister and after some time, her cousin 'X' (PW-3) and the appellant came out of the rented house of the appellant which is adjacent to her sister Yamak Nguki's house. When, she confronted them, her cousin 'X' told her that the appellant committed '*Jabardast*' (forceful assault) against her by gagging by her mouth. The appellant laid over his body and committed rape on

her. Her cousin 'X' (PW-3) also informed her that she was hidden in the bathroom by the appellant. At that time, she (PW-1) assaulted both the appellant and her cousin. They also tried to settle the case but failed. Finally, the FIR was lodged with the police of Daporijo PS.

17. PW-1 has stated in her evidence-in-chief that she did not know how the offence was committed. She has admitted in her cross examination that there were about 40 to 50 families in the same rental building at the time of the incident. Her cousin (PW-3) told her that the appellant hid her in the bathroom. When, she called out, the appellant first came out of the rented house followed by the victim. She noticed that the victim was nervous at that time.

18. The evidence of PW-1 and PW-3 is contradictory to the extent that PW-3 stated that PW-1 went into the appellant's room after ceaselessly banging on the appellant's door and she was hidden in the bathroom by the appellant. On the contrary, PW-1 stated that the appellant and the victim came out of the appellant's rented room. The remaining part of the evidence of PW-3 is not at all corroborated by the evidence of PW-1, except for the fact that PW-1 has stated that the appellant committed rape on the victim. The incident of rape was informed by the victim, but PW-1 did not know how the offence was committed. When the evidence of the victim is not found to be worthy of credence, the entire prosecution case falls through. The case itself is without a substratum.

19. Yamak Nguki is the owner of the house, which is adjacent to the appellant's house. She deposed as PW-2 that sometime during the year 2017, the victim 'X' was staying with her in a rented house at Urban Complex. When she returned from school, her cousin 'X' (victim) told her that the appellant committed rape on her in his rented house and they had a quarrel relating to this incident.

20. PW-2 also admitted that she did not know how the offence was committed and she did not know why the FIR was not lodged immediately after the incident. Thus, the PW-2 did not support the evidence of PW-3. She did not even know why the FIR was not lodged immediately after the incident. It is intriguing that being the cousin of the victim, PW-2 did not support the evidence of PW-3. PW-2 has stated in her evidence-in-chief that the victim came to stay with her for the first time in her house at Daporijo and the incident occurred at that time. The seizure witness, Smt. Sumita Makcha is a Nursing Officer and she deposed as SW-1 that in the year 2017, Dr. Khushboo Nalo had collected blood sample, vaginal swab (dry) and vaginal swab (wet) from a victim of sexual offence, which was later seized by the police in her presence. She proved her signature on the seizure Memo as Paper P. Ext. 6(B).

21. The informant 'Y' deposed as PW-6, that the appellant is known to him as he belongs to the same circle under the Subansiri district. About three years

ago, he received a message from Smt. Yamak Nguki that the appellant committed rape on his victim daughter in his residence at Urban Complex. Accordingly, he went to Daporijo and held a Kebang to settle the matter but as the appellant did not agree to pay the fine amount of Rs. 2,00,000/- imposed upon him by the Kebang, this instant case was lodged against the appellant. He was not certain, but he stated that P Ext. 11 and 11-B may be the original copy of the FIR. He admitted in his cross-examination that he was not present in the Kebang held in connection with this case. He has also admitted that the case was instituted against the appellant's wife as the appellant's wife assaulted his daughter. In addition to the assault by the appellant's wife the incident of rape is also a reason behind initiating a case against the appellant. The earlier complaint was lodged by Tade Nungnu.

22. At this juncture, the learned counsel for the appellant laid stress in his argument that as there was an earlier FIR, the present FIR is only a statement under Section 161 Cr.P.C.

23. I have perused the FIR lodged by 'Y'. The incident allegedly occurred on 26.10.2017, whilst the FIR was lodged on 16.11.2017. The FIR was elaborately written, but the deposition of PW-6 who lodged the FIR was very short and cryptic. Unlike his contentions in the FIR, PW-6 has failed to mention in his deposition that the appellant called his daughter up to his room for five times

and then, as she entered the room, he locked the room and forcefully committed rape on his victim daughter. The appellant also choked her neck and tried to restrain her and thereafter, he stripped her naked and committed the offence and threatened her with dire consequences. The victim herself has not mentioned that she was threatened by the appellant with dire consequences. The PW-6 has admitted that the FIR was lodged as the appellant failed to pay Rs. 2,00,000/- as compensation. The FIR was also lodged as the appellant's wife assaulted his daughter (PW-3). Although, the appellant denied in his statement under Section 313 Cr.P.C that he committed rape on the victim, yet the statement of the appellant under Section 313 Cr.P.C is similar to the deposition of PW-6, who stated that a compensation of Rs. 5,00,000/- was demanded from him and as he refused to pay the compensation and then, this case was lodged against him.

24. After a close scrutiny of the evidence, it can be concluded that the evidence is too farfetched and sketchy. The evidence is bristled with contradictions. The PW-6 appeared to be hesitant to implicate the appellant. Although he lodged an elaborate and descriptive FIR, yet his deposition in the Court was very cryptic and short.

25. The Medical Officer Dr. Khushboo Nalo, deposed as PW-4 that on 16.11.2017, she examined the victim in connection with this case and found the

following:-

The hymen was not intact and the victim was sexually active, but no injury could be found in and around the private part or lower part of the victim.

Her opinion was that there was no evidence to support theory of forceful intercourse at the time of her examination. She collected the biological samples from the victim and semen from the accused and handed it over to the I/O for further action. She proved the Medico legal report as P.Ext.-9 A. She proved the Medico legal certificate of both the victim and accused as P.Ext.10.

26. The I/O Inspector W. Kamhua deposed as PW-5. He identified the age estimation report as Paper Exhibit P.Ext-14. According to the age estimation report, the victim's age was about 15 to 17 years approximately.

27. It is submitted on behalf of the appellant that the age of the victim has not been correctly given by the victim. The victim mentioned her age to be 16 years, when her statement was recorded on 16.11.2017 and when her deposition was recorded on 17.12.2020, the victim gave her age as 19 years.

28. Recapitulating the entire evidence, it is held that the incident allegedly occurred 26.10.2017 and the FIR was lodged after a gap of 20 days i.e. on 16.11.2017. It was mentioned in the FIR that a Kebang was held on 7.11. 2017,

but as the matter could not be settled by the local Kebang, the FIR was lodged on 16.11.2017. The depositions of the prosecution witnesses are bristled with contradictions. The initial statement of the victim under Section 164 Cr.P.C is not consistent to her deposition in Court. The evidence of the victim is not supported by the evidence of her cousin, who allegedly rescued her from the appellant. It is true that when the victim was taken to the Medical Officer after a prolonged period, definitely no evidence of sexual assault could be detected on her examination by the Medical Officer. It has already been held in my foregoing discussions that the victim's evidence does not inspire confidence. The delay in lodgement of the FIR, despite the fact that a Kebang was held in between i.e. on 7.11.2017, cannot be ignored, more so, when the evidence of the witnesses are replete with contradictions. It has been admitted by the PW-3 that the FIR was lodged because she was assaulted by the appellant's wife. The PW-3 went to the extent of testifying in the Court that the Judicial Magistrate has not recorded her statement under Section 164 Cr.P.C according to her version. It is thereby held that the evidence PW-3 does not inspire confidence. Relating to the delay in lodgement of the FIR, the learned counsel for the appellant relied on the decision of Hon'ble the Supreme Court in ***Thulia Kali Vs. State of Tamil Nadu*** reported in ***(1972) 3 SCC 393***, wherein it has been held and observed that:-

“It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami PW was not found at his house till 10.30 p.m. on March 12, 1970 by Valanjiaraju, it is, not clear as to why no report was lodged by Valanjiaraju at the police station. It is, in our opinion, most difficult to believe that even though the accused had been seen at 2 p.m. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came, to know of the death of Madhandi deceased on the evening of March 12, 1970. They did not then know about the actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused: The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first in- formation report quite often

results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia, daughter-in-law of Madhandi deceased, according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjjaraju, stepson of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjjaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it. As regards the alleged recovery of knife and ornaments at the instance of the accused, we find that the evidence consists of statements of Inspector Rajagopal (PW-13), Kati Goundar (PW 6) and Chakravarthi (PW 9). According to Chakravarthi (PW 9), the accused handed over the ornaments in question to the witness when the accused came to the house of the witness on the evening of March 12, 1970 and passed the night at the house. The witness also found knife in the bed of the accused after he had left on the following day. According, however, to Kali Goundar (PW 6), the accused, on interrogation by the Inspector of Police, stated that he had entrusted the ornaments to Thangam, wife of

Chakravarthi (PW 9). Apart from the discrepancy on the point as to whom was the person with whom the accused had kept the ornaments, we find that Thangam, with whom the accused, according to Kali Goundar PW had kept the ornaments, has not been examined as a witness. In view-of the above statement of Kali Goundar, it was, in our opinion, essential for the prosecution to examine Thangam as a witness and its failure to do so would make the Court draw an inference against the prosecution.

Ex. 1 in his bed in the house of Chakravarthi (PW 9) when he had ample opportunity to throw away the knife in some lonely place before arriving at the house of Chakravarthi. The knife in question was found by Chemical Examiner to be not stained with blood and according to the prosecution case, the accused had washed it before leaving it in the bed in the house of Chakravarthi. If the accused realised the importance of doing away with the blood stains on the knife, it does not seem likely that he would bring that knife' to the house of Chakravarthi and leave it in the bed. Looking to all the circumstances, we are of the view that it is not possible to sustain the conviction of the accused on the evidence adduced. We accordingly accept the appeal, set aside the conviction of the accused-appellant and acquit him."

29. The appellant has also relied on the decision of Hon'ble the Supreme Court in ***State of A.P. versus M. Madhusudhan Rao (2008) 15 SCC 582***, wherein it has been held and observed that:-

"Time and again, the object and importance of prompt lodging of the First Information Report has been highlighted. Delay in lodging the First Information Report, more often than not, results in embellishment and exaggeration, which is a

creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of coloured version, exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Therefore, it is essential that the delay in lodging the report should be satisfactorily explained.”

30. Reverting back to this case, it is held that though that the informant made an attempt to justify the delay in lodging the FIR but delay of 20 days in lodging the FIR, was not satisfactorily explained by the informant. The contradiction in the evidence casts a shadow of doubt over the veracity of the evidence of the prosecution witnesses. The FIR lodged by the informant is not similar to the deposition of the informant in the Court. Conviction based on faulty evidence and delayed FIR, would be perilous.

31. The I/O, PW-5 has deposed that on 16.11.2017, who was posted as O/C at Dumporijo. At about ten 10:00 hours hours, an FIR was lodged by 'Y', which was registered as DMJ P.S. Case No. 15/2017, under Section 376/506 IPC read with Section 4 of the POCSO Act and he swung into action. He got the statement of the victim recorded under Section 164 Cr.P.C. The victim was forwarded for medical examination. He identified the FIR as P.Ext-11 and P. Ext-11-A, as his seal with signature. He went to the place of occurrence and prepared the sketch map. He proved his signature on the sketch map as P. Ext-

13(A). He proved P.Ext.19 as supplementary charge-sheet and identified the signatures of S.I. B.Tadu as Exhibit-19 (A and B).

32. Thus, it is clear from the evidence of the I.O. and the evidence of the other witnesses that the investigation was conducted after a prolonged period i.e. after a span of 20 days of the incident.

33. The learned counsel for the appellant has relied on the decision of Hon'ble Supreme Court in ***Santosh Prasad Vs. State of Bihar, (2020) 3 SCC 443***, wherein, it has been observed that:-

5.4.2. In Rai Sandeep³, this Court had an occasion to consider who can he said to be a "sterling witness". In para 22, it is observed and held as under: (SCC p. 29)

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co- relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner

of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

34. Reverting back to this case, it is held that the victim is not found to be a witness of sterling quality. Her deposition in the court is not consistent to her statement under Section 164 Cr.P.C. Her statement is not corroborated by her cousin's evidence, who allegedly recovered her initially from the clutches of the appellant. When the evidence of the victim is not found to be worthy of credence, the entire case is without a substratum. The victim's cousin PW-2, in whose house the victim was staying, also did not support the victim's case. The evidence of victim's father is not similar to the FIR lodged by him. The victim went to the extent of stating that the Judicial Magistrate did not record her statement under section 164 Cr.P.C, according to her version, but recorded something else. The statement which was recorded by the Judicial Magistrate under Section 164 Cr.P.C was denied by the victim. It is manifest that the victim

was vacillating and giving contradictory statements

35. In the wake of my foregoing discussions, it is thereby held that, the judgment and order of conviction and sentence passed by the learned trial court is not sustainable. This appeal is allowed and the order of conviction and sentence dated 07.09.2022 in BSR/Session Case No. 01/2020 is set aside. Appellant is to be set at liberty forthwith if not wanted in any other case.

36. However, keeping in view the provisions of Section 437-A Cr.P.C, the appellant Tamar @ Chikmar Mallig is directed to furnish a personal bond in the sum of 50,000/- (Rupees Fifty Thousand) and a surety bond in the like amount before the learned trial Court, which shall be effective for a period of 6(six) months from today (29.11.2023).

Send back the LCR.

JUDGE

Comparing Assistant